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Durable Power of Attorney

A power of attorney is the grant of legal rights and powers by a person, the "principal", to another, the "agent" or "attorney-in-fact". The agent, in effect, stands in the shoes of the principal and acts for him or her on financial and business matters. Under a general POA, the agent can do whatever the principal may do—withdraw funds from bank accounts, trade stock, pay bills, cash checks —except as limited in the power of attorney. This does not mean that the attorney-in-fact can just take the principal's money and run. The attorney-in-fact must use the principal's finances as the principal would for his or her benefit.

When does the power of attorney take effect?

Unless the power of attorney is "springing", it takes effect as soon as it is signed by the principal. A "springing" power of attorney takes effect only when a triggering event described in the instrument itself takes place. Typically, this is the incapacity of the principal as certified by one or more physicians.

Does the power of attorney take away a principal's rights?

No, absolutely not. Only a court can take away a principal's rights in a conservatorship or guardianship proceeding. An agent simply has the power to act along with the principal.

Can the principal change his or her mind?

Certainly. A principal may revoke a power of attorney at any time. All a principal needs to do is send a letter to his or her attorney-in-fact stating that the appointment has been revoked. From the moment the attorney-in-fact receives the letter, he or she no longer has authority to act under the power of attorney.

Can an attorney-in-fact be held liable for his or her actions?

Yes, but only if he or she acts with willful misconduct or gross negligence.

Can an attorney-in-fact be compensated for his or her work?

Yes, if the principal has agreed to pay the attorney-in-fact. In general, the attorney-in-fact is entitled to "reasonable" compensation for his or her services. However, in most cases, the attorney-in-fact is a family member and does not expect to be paid. If an attorney-in-fact would like to be paid, it is best that he or she discuss this with the principal, agree on a reasonable rate of payment, and put that agreement in writing. That is the only way to avoid misunderstandings in the future.

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What if there is more than one attorney-in-fact?

Depending on the wording of the power of attorney, you may or may not have to act together on all transactions. In most cases, when there are multiple attorneys-in-fact they are appointed "severally", meaning that they can each act independently of one another. Nevertheless, it is important for them to communicate with one another to make certain that their actions are consistent.

Can the attorney-in-fact be fired?

Certainly. The principal may revoke the power of attorney at any time. All he or she needs to do is send the attorney-in-fact a letter to this effect. The appointment of a conservator or guardian does not immediately revoke the power of attorney. But the conservator, like the principal, has the power to revoke the power of attorney.

What kind of records should the attorney-in-fact keep?

It is very important that the attorney-in-fact keep good records of his or her actions under the power of attorney. That is the best way to be able to answer any questions anyone may raise. The most important rule to keep in mind is not to commingle the funds the attorney-in-fact are managing with his or her own money. Keep the accounts separate. The easiest way to keep records is to run all funds through a separate checking account. The checks will act as receipts and the checkbook register as a running account.